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Case No. 90-5319

IN THE
Supreme Court of the United States
October Term, 1990

PAUL MCNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

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*The States joining in this brief are listed in Appendix A of this brief.

QUESTION PRESENTED

WAS THE PETITIONER PAUL MCNEIL'S ACCEPTANCE OF ASSISTANCE OF COUNSEL AND APPEARANCE WITH COUNSEL AT AN INITIAL APPEARANCE ON A CHARGED OFFENSE OF ARMED AND MASKED ROBBERY AN INVOCATION OF MCNEIL'S FIFTH AMENDMENT RIGHT TO COUNSEL THAT PRECLUDED POLICE INITIATED INTERROGATION ON AN UNRELATED, UNCHARGED HOMICIDE WHILE THE ACCUSED WAS IN CONTINUOUS CUSTODY?

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INTEREST OF AMICI CURIAE

The states joined herein as amici curiae have a compelling interest in the outcome of this case, as it has the potential to significantly and adversely affect law enforcement and prosecution practices. It is the position of the joined states that the decision of the Wisconsin Supreme Court was well grounded in logic and in law, and follows this Court's established precedent. Its decision should be affirmed.

ARGUMENT

The amicus states support the decision of the Wisconsin Supreme Court in the case under review and urge the Court to adopt the rationale espoused by that court. In addition, the amicus states wish to point out the potentially adverse practical consequences of a contrary ruling.

The Petitioner urges this Court to adopt the rule of *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117 (7th Cir. 1987), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 745 (1987), that a criminal defendant's acceptance of sixth amendment counsel automatically triggers an invocation of the right to counsel under the fifth amendment. Such a holding is unworkable as well as unnecessary in light of this Court's jurisprudence. *Espinoza* is based on two premises, both drawn from *Michigan v. Jackson,* 475 U.S. 625 (1986): the first, that an individual "has invoked the full extent of his or her constitutional right to counsel" and, second, that an accused is unable to distinguish which constitutional right he is invoking.

While these principles when viewed in isolation seem unobjectionable, they would, if carried to their logical extension, completely eliminate the important distinctions between the fifth and sixth amendment rights to counsel. Such a holding would effectively graft an entire body of law relating to the fifth amendment onto the sixth amendment analysis. Such a result is unnecessary and unwise.

The distinctions between the fifth and sixth amendment rights to counsel are settled and familiar. The fifth amendment right is a prophylactic rule which protects the privilege against self-incrimination. *Solem v. Stumes,* 465 U.S. 638, 644 n. 4 (1984). The rule is designed to protect against the inherent coerciveness of custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966). The sixth amendment right,

on the other hand, does not attach until the initiation of adversarial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams,* 430 U.S. 387 (1977). It was the sixth amendment right which the Court addressed in *Jackson.* There, the defendants in two separate cases, requested counsel at their arraignments but were reinterrogated and confessed before they could consult with their attorneys. While this Court analogized to its fifth amendment rationale in *Edwards v. Arizona,* 451 U.S. 477 (1981), it expressly *refused* to cast its opinion in fifth amendment terms. *Jackson, supra,* at 630 n. 4.

The assertion of the *Jackson* petitioners was that the right to counsel under the sixth amendment guaranteed counsel at all critical proceedings — including interrogation — following arraignment. The State's position was that it applied only in "formal" proceedings. It was in the context of this debate that the Court found that the "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. ..." *Jackson, supra,* at 633.

When this language is thus viewed against its proper background, it becomes clear that the *Espinoza* court interpreted it far too sweepingly. While the *Jackson* court gave an expansive scope to the sixth amendment right to counsel, nothing in the opinion even hints that its invocation is equivalent to an invocation of the fifth amendment right.

The second premise upon which *Espinoza* rests is that a defendant is unable to discern between the fifth and sixth amendment rights to counsel, therefore invocation, or even passive acceptance of, the sixth amendment right must be construed as a request under the fifth amendment. This argument misunderstands both the fundamental differences in the nature of the fifth and sixth amendment rights

and the role of the courts in determining the scope and extent of constitutional rights.

The fifth amendment "right" to counsel, as previously discussed, is not a true right but a protection against the inherent compulsion associated with custodial interrogation. It is designed to protect an individual's *choice* to speak or remain silent. The sixth amendment right to counsel, on the other hand, is a constitutional *guarantee.* While it is possible to waive this right, numerous procedural steps must be taken to do so and, even then, the state may appoint standby counsel. *Faretta v. California,* 422 U.S. 806 (1975); *United States v. Fant,* 890 F.2d 408 (11th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1498, 108 L.Ed.2d 644 (1990).

To equate the two rights would be to transform a safeguard of individual choice into a deprivation thereof because, by appointing sixth amendment counsel, the state would effectively make the defendant's fifth amendment election for him. There is neither the need nor the precedent to support such action.

Nor does the fact that a defendant is ignorant of the nature of his rights lead to a different conclusion. It is the courts which determine which constitutional rights apply in a given circumstance and the extent and scope of those rights. The defendant's ability to "understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel" is therefore not a factor in this constitutional equation.

The issue is whether the defendant has evidenced a discernible desire not to be questioned without counsel present, as opposed to a desire to have an attorney to assist in the preparation of his defense. This is quite clearly a distinction the criminal defendant *is* able to make. More important, it is one that a *defendant* must elect to exercise. There is no reason to believe that a defendant who has been advised of

his *Miranda* rights, and not seen fit to request counsel during interrogation, exercised that right *merely* by accepting counsel for trial.

The practical impact of reversal in this case would be enormous. Such a ruling would require that after any formal adversarial proceedings were initiated as to *any* crime, the police would be unable to initiate questioning even as to unrelated, uncharged, crimes unless counsel is present. *Minnick v. Mississippi,* Case No. 89-6332, (Decided December 3, 1990). Thus, although a defendant may initially have waived *Miranda* and freely and voluntarily confessed to a crime with which he is charged, if he accepts counsel to represent him at trial the police must wait for him to volunteer further information. Indeed, to further suggest counsel will freely allow a defendant to speak to the police avoids the reality of criminal defense litigation. Since neither of these two possibilities is likely to occur, the practical effect of an adoption of *Espinoza* would be to completely foreclose questioning after the sixth amendment rights attach.

The implications for such a rule would be particularly grave for any state which, by its own law, affords criminal defendants enhanced protection under the sixth amendment.

It is state law which determines at what point adversarial proceedings commence and, therefore, at what time the sixth amendment right to counsel attaches. *Moore v. Illinois,* 434 U.S. 220, 228 (1977); *Felder v. McCotter,* 765 F.2d 1245, 1247 (5th Cir. 1985), *cert. denied,* 475 U.S. 1111 (1986). A state could theoretically expand a defendant's sixth amendment protection by deeming the adversarial process to begin at some very early stage in the proceedings, perhaps as early as arrest. To the extent it offered this greater protection, however, the state would be penalized by

the concomitant and automatic triggering of a defendant's fifth amendment rights. A holding in accord with *Espinoza* thus would not only hinder a state's present law enforcement practices, but would act as a disincentive for the states themselves to expand individual rights.

The Wisconsin Supreme Court correctly interpreted the scope and purpose of the fifth and sixth amendment rights to counsel. In addition, such interpretation avoids the untoward and potentially unforeseen pitfalls of the *Espinoza* rationale.

Accordingly, the states joined herein as amici curiae respectfully urge this Court to affirm the Petitioner's conviction.

CONCLUSION

The states joining this brief submit that the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted

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APPENDIX

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